

FILED

DEC 01 2011

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.*  
DOE, *et al.*,

Plaintiff,

No. C 09-03651 JSW

v.

ELI LILLY AND COMPANY,

Defendant.

**ORDER DISCHARGING ORDER  
TO SHOW CAUSE; ORDER  
UNSEALING IN PART; AND  
DIRECTING CLERK TO CLOSE  
FILE PURSUANT TO NOTICE OF  
VOLUNTARY DISMISSAL**

On September 7, 2011, the United States filed its Notice of Election to Decline to Intervene, in which it and twenty-eight states and the District of Columbia, stated their election not to intervene in this action. On that same date, the Court issued an Order in which it Ordered, *inter alia*, “[a]ll sealed contents of the Court’s file in this action shall remain under seal and not be made public or served upon Defendants, *except* for the Complaint, this Order, and the accompanying United States’ Notice of Election to Decline Intervention, which are hereby unsealed.” (Docket No. 23, September 7, 2011 Order at 3, ¶ 1.) The Court also ordered that “[t]he seal is lifted as to all matters occurring in this action *after* the date of this Order.” (Id., ¶ 3.) Finally, the Court Ordered that “[s]hould the Relator ... propose that this action be dismissed, settled, or otherwise discontinued, the Court will provide the United States and the above-named States with notice and an opportunity to be heard before ruling or granting its approval.” (Id., ¶ 6.)

1 On October 26, 2011, Plaintiff/Relator John Doe, filed a notice of voluntary dismissal  
2 pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i). In contravention of the Court's  
3 previous Order, Plaintiff filed that Notice under seal. (See Docket No. 24.)

4 On November 7, 2011, the Court issued an Order to Show Cause directing  
5 Plaintiff/Relator to show cause why the Complaint, the September 7, 2011 Order, the United  
6 States' Notice of Election to Decline Intervention, and all subsequent filings, including the  
7 Order to Show Cause should not be unsealed pursuant to the terms of the September 7, 2011  
8 Order. The Court also ordered that if the United States, the District of Columbia or any of the  
9 28 states who have declined to intervene have any objections to the Notice of Dismissal, they  
10 must file any such objection with the Court by no later than November 18, 2011.

11 The Court has received a timely response from the Plaintiff/Relator, and it also has  
12 received a response from the United States. It has not received responses from any of the named  
13 states or the District of Columbia.

14 The United States does not object to dismissal, so long as it is clear that the dismissal is  
15 without prejudice as to the United States, the named states and the District of Columbia.  
16 Accordingly, the Court GRANTS the request to voluntarily dismiss this case, and that dismissal  
17 is without prejudice to the United States, the named states and the District of Columbia.

18 Plaintiff/Relator states that he does not oppose the unsealing of the United States' Notice  
19 of Election to Decline Intervention and other subsequent filings in this case, but he asks that the  
20 complaints and his response to the Order to Show Cause remain sealed, because he fears  
21 retaliation. The United States opposes this request. Plaintiff/Relator was granted permission to  
22 proceed under a fictitious name.<sup>1</sup> He argues that there is information in the various complaints  
23 that would disclose his identity and, thus, would undermine the order permitting him to proceed  
24 under the pseudonym John Doe. At the same time, the United States notes that the initial  
25 sealing of a *qui tam* proceeding is intended to protect the government's investigation. See 31

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27 <sup>1</sup> That fact distinguishes this case from *United States ex rel Herrera v. Bon Secours Cottage Health Servs.*, 665 F. Supp. 2d 782, 786-86 (E.D. Mich. 2008) and *United States ex rel. Permison v. Superlative Technologies, Inc.*, 492 F. Supp. 2d 561, 564 (E.D. Va. 2007), on which the Government relies to support its argument that the complaints should be unsealed.

1 U.S.C. § 3730(b)(2), (3); *U.S. ex rel Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 245-47 (9<sup>th</sup> Cir.  
2 1995).

3 The Court finds that an appropriate balance between these two interests can be achieved  
4 by permitting *only* those paragraphs of the complaints<sup>2</sup> or exhibits thereto that could clearly  
5 identify Plaintiff/Relator to remain under seal. The parties shall meet and confer on this issue  
6 and attempt to reach a stipulation regarding those portions that may remain under seal. If they  
7 are unable to reach agreement, Plaintiff shall file a motion to seal setting forth the specific  
8 paragraphs and exhibits that would be likely to reveal his identity and frustrate the purpose of  
9 permitting him to proceed under a pseudonym. The parties shall follow the same procedure  
10 with respect to Plaintiff's response to the Order to Show Cause.

11 Accordingly, that the Clerk shall unseal this case. The United States Notice of Election  
12 to Decline to Intervene (Docket No. 23) shall be unsealed. Plaintiff's Notice of Voluntary  
13 Dismissal Shall be Unsealed. The Court's Order to Show Cause dated November 7, 2011, shall  
14 be unsealed. The United States' Response to the Court's Order to Show Cause also shall be  
15 unsealed. Pending further order of the Court, the Complaint, the First Amended Complaint, the  
16 Second Amended Complaint, any document attaching those documents, and Plaintiff's response  
17 to the Court's Order to Show Cause shall remain sealed.

18 **IT IS SO ORDERED.**

19  
20 Dated: DEC 01 2011  
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JEFFREY S. WHITE  
UNITED STATES DISTRICT JUDGE

28 <sup>2</sup> The pleadings consist of the original complaint, as well as first, second and  
third amended complaints.

United States District Court  
For the Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, STATE  
OF CALIFORNIA, STATE OF DELAWARE,  
ET AL.,

C-09-3651 JSW  
UNDER SEAL

Plaintiff(s),

v.

ELI LILLY & COMPANY,

Defendant(s).

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 1, 2011, I SERVED a true and correct copy of the attached, by placing said copy in a postage paid envelope addressed to the person(s) listed below, by depositing said envelope in the U.S. Mail; or by placing said copy into an inter-office delivery receptacle located in the Office of the Clerk.

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DATED: December 1, 2011

RICHARD W. WIEKING, CLERK

BY: *Jennifer Ottolini*  
Deputy Clerk